

Upper Clark Fork River Basin Steering Committee
Meeting Summary
April 19, 2006

Introductions

Gerald Mueller and members of the Upper Clark Fork River Basin Steering Committee (Steering Committee) introduced themselves. Those in attendance included:

Members	Group/Organization Represented
Bob Benson	Clark Fork Coalition
Holly Franz	PPL Montana LLC
Stan Bradshaw	Trout Unlimited
Bob Bushnell	Lewis & Clark Conservation District
Nate Hall	Avista
Jim Dinsmore	Granite Conservation District
Carol Fox	Natural Resource Damage Program (NRDP)
Brent Mannix	North Powell Conservation District
Jules Waber	Powell County
Jim Quiggley	Little Blackfoot Rancher
Rep. Jon Sesso	Butte-Silver Bow
Guests	
Bill Schultz	DNRC, Water Resources, Missoula
Jeana Baker	UM Environmental Studies Department/Survey Analyst
Tom Mostad	NRDP
Sarah Carlson	Montana Association of Conservation Districts
Dorothy Bradley	District Court Liaison to Gallatin Water Commissioners
George Alberta	West Gallatin Water Commissioner
Peter Marchi	Musselshell Water Commissioner
Walt Sales	Chair of AGAI
Dave Pruitt	Former Chief Water Commissioner for Gallatin County's 18 th Judicial District
Jody Miller	United States Forest Service
Faye Bergan	Reserved Water Rights Compact Commission
Kristine Knutson	United States Environmental Protection Agency
Allan Steinle	Army Corps of Engineers
Staff	
Mike McLane	DNRC
Gerald Mueller	Facilitator

Agenda

- Review of the March 21, 2006 Meeting Summary
- Montana Watershed Stewardship Award
- Montana Supreme Court Smith River Decision
- State-USFS Reserved Water Rights Compact and Upper Clark Fork River Basin Closure

- Adjudication Survey Results
- Rep. Sesso Surface and Ground Water Proposal
- Post-Adjudication Paper Discussion
- EPA Wetlands Mitigation Rules
- Clark Fork Coalition Deer Lodge Valley Meeting
- Steering Committee Work Plan
- Public Comment
- Next Meeting

March 21, 2006 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Montana Watershed Stewardship Award

Gerald Mueller reported that he had nominated the Steering Committee for the *2006 Montana Watershed Stewardship Award* as a result of a request from the Montana Coordinating Council (MCC). On April 4, Mr. Mueller received a letter the Glenn Philips, Chair of the MCC Watershed Recognition Work Group, notifying the Steering Committee that it had received the award. A copy of Mr. Philip's letter is in Appendix 1. The award will be presented by Lieutenant Governor Bohlinger at 11:00 a.m. on Tuesday, May 16 in the Capitol Rotunda. In conjunction with the award ceremony, the MCC will have a panel discussion in the afternoon of the Steering Committee's paper entitled, "How Will Completion of the Adjudication Affect Water Management in Montana?" Holly Franz volunteered to represent the Steering Committee on this panel. Mr. Mueller encouraged members of the Steering Committee to attend the award ceremony and panel discussion.

Montana Supreme Court Smith River Decision

Stan Bradshaw summarized the recent Montana Supreme Court decision in *Montana Trout Unlimited, et. al., versus DNRC, et. al.* Mike McLane passed out copies of the decision, which is available at <http://www.lawlibrary.mt.gov/dscgi/ds.py/Get/File-51011/05-069.rtf>.

This decision addressed the definition of "immediately or directly connected" which occurs in the statutory closure of the upper Missouri River basin. To process a permit for a new well in the closure area, the DNRC must find that the well would not pump ground water immediately or directly connected to surface water. The DNRC had issued permits for new irrigation wells in the Smith River drainage because it found that those wells did not pull Smith River water from the stream toward the well, the test which DNRC refers to as induced infiltration. The Court found that limiting the test for an immediate or direct connection between surface and ground to induced infiltration is not legally adequate. In addition to induced infiltration, the DNRC must determine if a new well would intercept ground water that "...otherwise would have entered the stream thereby causing a reduction in surface flows." The Court labeled this interception "prestream capture of tributary ground water." It found that DNRC may not process a permit application for a new well in the upper Missouri River basin that fails either the induced infiltration or the prestream capture test.

Not all basin closures include the "immediate and direct connection" language. The upper Clark Fork closure specifies a different test for permitting new wells. Section 85-2-337 MCA states:

Ground water permit applications -- report required. (1) During the period of basin

closure provided in 85-2-336(1), an applicant for a ground water permit in the Upper Clark Fork River basin shall submit a report prepared by a professional engineer or hydrologist addressing the hydrologic connection between the source of the ground water and surface water. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-302.

(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.

Mr. Bradshaw stated that while the Smith River decision does not apply directly to the upper Clark Fork closure, the DNRC is likely to apply the dual induced infiltration- prestream capture test in interpreting whether ground water is "...a part of or substantially or directly connected to surface water." Thus ground water permitting activities in the upper Clark Fork basin are likely to change.

Mr. McLane stated that the Smith River decision may increase the impetus for an agreement in the DNRC Surface and Ground Water Working Group (Working Group) to unify all basin closure language to allow new ground water developments provided that augmentation mitigates the impacts of new wells on surface water. He noted that the Working Group has agreed to augmentation but is still discussing what specifically must be mitigated, adverse affects on senior water rights or stream depletions.

The Steering Committee agreed to continue to follow and review the products of the Working Group.

State-USFS Reserved Water Rights Compact

Faye Bergan, an attorney with the Reserved Water Rights Compact Commission (Compact Commission), and Jody Miller, an attorney in the Office of General Council of the USFS Region 1, discussed the ongoing negotiations between the Compact Commission and the USFS. Rather than attempting to agree on reserved water rights for instream flows in all 750 basins on USFS lands in Montana, the state has suggested that the USFS pursue water reservations to protect instream flows in basins of particular interest to the USFS. Instream flow water reservations would provide the USFS standing to object to claims made in the adjudication process and to water right permit change applications. Change applicants would also have to demonstrate no adverse effect on the USFS water reservations. Water reservations, however, would require new exceptions to existing basin closures, including the upper Clark Fork River basin closure. Some Steering Committee members expressed reluctance to opening the upper Clark Fork closure to provide reservations to the USFS. The Steering Committee agreed to discuss the proposal for an exemption to the upper Clark Fork closure for USFS instream flows at its next meeting in May. Prior to that meeting, the USFS agreed to provide the Steering Committee with maps showing the forests in the upper Clark Fork for which reservations would be requested as well as an analysis of what specifically the USFS would gain through the closure exemption and why only the closure would provide that benefit.

Adjudication Survey Results

Jeana Baker, a senior in the UM Environmental Sciences Department (EVST), and Gerald Mueller discussed the results of the adjudication survey of water rights holders in the Flint Creek and Blackfoot sub-basins. The survey was conducted in cooperation with the EVST. Ms. Baker compiled the results of the individual surveys, and the Watershed Health Clinic of the EVST provided funds for survey postage. Ms. Baker reviewed the results in a Power Point presentation, the content of which is given in outline form in Appendix 2. Ms. Baker's full report is also included in Appendix 2. Mr. Mueller will present the survey results to the Environmental Quality Council of the Montana Legislature on May 19 as a part of his presentation on the post-adjudication paper, "How Will Completion of the Adjudication Affect Water Management in Montana?"

Steering Committee members noted that the survey results indicate that many water users have concerns with or do not understand the adjudication process.

Rep. Sesso Surface and Ground Water Proposal

Representative Sesso discussed the two ideas contained in his March 13, 2006 memo to the Steering Committee. See Appendix 3. The ideas were exempting domestic wells from the adjudication fee and requiring developers of rural subdivisions and ultimately lot owners to pay for the use of ground water. Rep. Sesso noted that Mary Sexton opposes exempting domestic well owners from the fee because it connects them to the state permitting process, encourages them to perfect their water rights, and focuses their attention on the water resource. The argument for exempting them is that their inclusion in the fee was a last minute decision that was not widely discussed with the public. Regarding the second idea, Steering Committee members stated that people pay only for the delivery and not for the use of water. This discussion also pointed for the need to review the 35 gpm/10 acre ft per year exemption from the ground water permit requirement.

Post-Adjudication Paper

As reported at the March 21, 2006 Steering Committee meeting, Mike McLane hosted a conference call to discuss the post-adjudication paper, "How Will Completion of the Adjudication Affect Water Management in Montana?" with Gallatin and Musselshell water interests. The call included: George Alberta, a west Gallatin water commissioner; Dorothy Bradley, the District Court Liaison to Gallatin Water Commissioners; Colleen Coyle, a water master with the Water Court; Peter Marchi, the head water commissioner on the Musselshell River; Dave Pruitt, the former chief water commissioner for Gallatin County's 18th Judicial District; Walter Sales, Chair of AGAI; and Gerald Mueller. As a result of this call, the conference call participants drafted a response to the paper and volunteered to attend this meeting to discuss it with the Steering Committee. The response is included below in Appendix 4. All of the aforementioned people concerned with water use from the Gallatin and Musselshell attended this meeting except for Ms. Coyle.

Concerns and ideas expressed by the members of the Gallatin and Musselshell group included:

- The water enforcement systems for the Musselshell, West Gallatin, Willow Creek, and Middle Cottonwood are working well.
- Centralization of the water commissioner function, particularly turning commissioners into

state employees, would neither improve water regulation nor be acceptable to water rights owners.

- The relationship of commissioners with district judges in the Gallatin has not only worked adequately and efficiently, but, coupled with a system of water mediation, has kept litigation to a minimum.
- Designating district judges to work only on water issues might be beneficial.

Mr. Mueller agreed to present the response paper and discuss these ideas/concerns in his May 19 presentation to the EQC.

EPA Wetlands Mitigation Rules

In response to an invitation from the Steering Committee, Kristine Knutson of the United States Environmental Protection Agency (EPA), and Allan Steinle of the Army Corps of Engineers (Corps), discussed EPA's recent rule proposal for wetlands conservation. The Corps issues permits for activities involving wetlands and EPA enforces federal wetland regulations. Ms. Knutson passed out a fact sheet on the proposed rule which is contained in Appendix 5 below. One focus of the proposed rules is the establishment of wetland mitigation banks. According to the fact sheet:

...a wetland mitigation bank is a wetland area that has been restored and protected to provide compensation for impacts to wetlands. A mitigation bank may be created when a government agency, corporation, nonprofit organization or other potential bank sponsor undertakes wetland restoration and protection activities under a formal agreement with the Corps. This formal agreement describes the wetland area's restoration plan and establishes the number of environmental credits the restoration work can potentially generate. Although most mitigation banks are designed to compensate only for impacts to various wetland types, within the past five years, banks have been developed to compensate specifically for impacts to streams.

Someone wishing to develop an area including a wetland can purchase credits from the bank as one way of meeting the no net loss of wetlands requirement. Ms. Knutson said that wetland banks are probably more significant in the eastern US than in Montana. EPA's preferences regarding development and wetlands are: first, avoid developing them; second, minimize impacts on-site to the extent practicable; and third, provide in-kind mitigation such as credits from mitigation banks on a 1.5 acres of in-kind mitigation to 1 acre of wetlands destroyed through development.

Clark Fork Coalition Deer Lodge Valley Meeting

Bob Benson reported that the Clark Fork Coalition in cooperation with the Clark Fork River Technical Assistance Committee and the Watershed Restoration Coalition held two days of meetings on March 22 and 23 in Deer Lodge. The meetings were a follow-up to the meeting conducted in November 2004. Its purpose was to reaffirm or revise the vision developed at the November 2004 meeting and begin planning and implementing specific strategies to meet that vision. The specific areas addressed were: the Clark Fork River cleanup, water use, education, economic development, and land use. Ideas specific to water use included characterizing the Deer Lodge Valley water system, stream augmentation, and simplifying the water rights system. Mr. Benson stated that he provided copies of the Steering Committee's post-adjudication paper to meeting participants wanting one. A report on the meeting by its facilitator will be available soon.

Steering Committee Work Plan

Gerald Mueller asked for ideas for next year's work plan. He explained that the Steering Committee's current funder, the Watershed Assistance Grant Program, has in the past demanded an on-the-ground project. The Steering Committee in recent years has focused on water quantity policy issues such as the adjudication process and how completion of the adjudication will affect water management and regulation. The on-the-ground work has addressed flows in the mainstem of the Clark Fork River above Deer Lodge. Another on-the-ground idea explored by the Steering Committee is reconnecting the mainstem of the river to its former channel that was cutoff by construction of the railroads and the highways/interstate. Projects involving the river mainstem cannot proceed until either a settlement is reached in the state-ARCO natural resources damage litigation or the litigation proceeds to a conclusion. The DNRC is considering how it funds watershed groups and particularly groups such as the Steering Committee which are charged statutorily with water management planning in a large basin. DNRC may decide to make additional funding opportunities available to such groups. In any case, the Steering Committee needs to develop a work plan for the next fiscal year, FY 2007.

Ideas suggested by Steering Committee members included:

- Continue to facilitate discussion of the post-adjudication paper and refine the future options contained in it.
- Consider how the Smith River Supreme Court decision will affect ground and surface water development in the upper Clark Fork River basin.
- Continue to consider and discuss with basin water users, the proposal of exemptions to the basin closure for USFS instream flow water reservations.
- Discuss and develop proposals to address the ground water permit exemptions for wells that pump at less than 35 gpm and 10 acre-ft. per year.
- Develop a basin water balance.
- Compile what is known about the basin's ground water resource.
- Continue to monitor the work and recommendations of the DNRC Surface and Ground Water Working Group.

These ideas will be considered further at the May Steering Committee meeting.

Public Comment

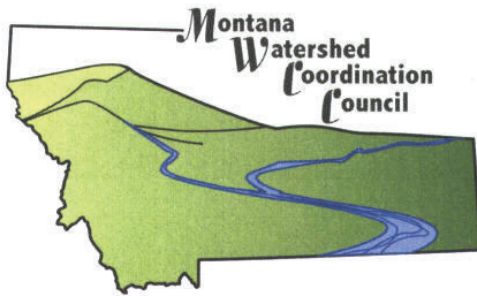
There was no public comment.

Next Meeting

The next meeting was scheduled for Monday, May 15, 2006 in Deer Lodge. The agenda will include:

- An update on Steering Committee future funding ;
- Continued discussion of the proposal for a basin closure exemption for USFS instream flow water reservations;
- A preview of the post-adjudication paper presentation to the EQC;
- Additional discussion of the Steering Committee work plan for the next fiscal year; and
- Report on the status of upper Clark Fork water story.

Appendix 1



Montana Watershed Coordination Council
C/O Montana Fish, Wildlife and Parks,
1420 6th Avenue East
Helena, MT 59620-0701

April 4, 2006

Gerald Mueller
Upper Clark Fork Basin Steering Committee
440 Evans Avenue
Missoula, MT 59801

Dear Gerald and Members of the Upper Clark Fork Basin Steering Committee,

On behalf of the Watershed Recognition Work Group of the Montana Watershed Coordination Council (MWCC) and the full Council, it is with great pleasure that we officially inform you that your organization has been selected as the recipient of the *2006 Montana Watershed Stewardship Award*. Your group was selected because of your outstanding contributions toward promoting the health and viability of the Upper Clark Fork River Basin watershed.

We are currently finalizing details of the awards ceremony, which will be held in conjunction with the quarterly Council meeting on Tuesday, May 16, 2006. The ceremony will begin at 11:00 a.m. in the State Capitol Rotunda in Helena. Lieutenant Governor Bohlinger will participate in the ceremony. We will provide you with an agenda and directions as soon as these details are finalized. Following the ceremony we will have a catered lunch in the Capitol.

Prior to the awards ceremony, your group will be asked to give a presentation to council members describing your efforts and achievements. Gerald we are looking forward to hearing from your group on May 16 and joining you to celebrate your accomplishments.

Sincerely,

Glenn R. Phillips, Chairman
Watershed Recognition Work Group

Appendix 2
Adjudication Survey Results
Upper Clark Fork River Basin Steering Committee
April 2006

Survey Data

181 surveys were mailed, 112 to Flint Creek and 69 to Blackfoot sub-basins.
11 letters returned because of bad addresses, 10 from Flint Creek and 1 from the Blackfoot.
31 (18%) surveys completed and returned.

Survey Question 1

Do you hold a pre-1973 water right from the State of Montana?
The majority of respondents answered "yes."

Survey Question 2

What water uses are provided by your water rights?
The water uses in order of most use were: irrigation, stockwater, and domestic.
No responses to mining and other uses.

Survey Question 3

Have you or your representative participated in the statewide adjudication of water rights?
Half responded "yes,"
Half said either "no," "don't know" or left this question blank.

Survey Question 4

If the previous answer was yes, how have you participated?
The majority either filed a claim or filed an objection to a claim.
Others hired an attorney, and a couple testified in a hearing.

Survey Question 5

What is the estimated cost of your participation in the adjudication process in time and dollars?
A few people said \$500 while other expenses were listed at \$60, \$100, \$600, \$800, \$1500, \$2000, \$3800, 5,000, \$100,000.
Only a few responded to the time involved. Some of the hours listed were 25hrs, 40hrs, 80hrs.

Survey Question 6

Is your pre-1973 water right included in a water right decree issued by the Montana Water Court in the current state-wide adjudication process?
The majority responded "yes" that their pre-1973 water right was issued in a water right decree by the Montana Water Court.

Survey Question 7

On a scale of 1 to 10 with 1 meaning very dissatisfied and 10 meaning extremely satisfied, how would you rate the adjudication process?

Left blank: 23%. Some said the adjudication process was non applicable.

1: 17%

2: 17%

3: 3 %

4: 10%

5: 23%

7: 7%

zero responses from 8-10.

Survey Question 8

Do you expect that completion of the adjudication will make your use of water easier, harder, or have no effect?

Majority replied that it will make water use harder.

Survey Question 9

How will completion of the adjudication affect your use of water?

One respondent said easier because adjudication would “protect current water rights and document actual use prior to 1973.”

Most said harder for the following reasons:

Combining several decrees into one is not practical and not historical in use.

More complicated, more expensive but more secure.

More paperwork, wasted time, no help.

Installation of measuring devices.

Lose the use of some water.

More bureaucratic, less collaboration with local users.

Survey Question 10

Is your water right regularly administered by a water commissioner?

The majority responded “no.”

Survey Question 11

Would you support requiring all water rights holders in the decree that the commissioner is enforcing to help pay for the commissioner?

The majority responded “yes.”

Survey Question 12

Do you expect that enforcing your water right(s) will be easier or harder after the adjudication process is completed?

The majority said it would be harder after the adjudication process.

Survey Question 13

Should the DNRC be more active in enforcing water rights?

Most said that the DNRC should be more active in enforcing water rights.

Survey Question 14

About how much time and money have you spent defending your water rights?

For the majority, there was zero cost in defending water rights.

Some mentioned the following costs and hours:

\$500 (2)

~\$1000(5)

\$2,000

\$12,000(2)

\$25,000

\$28,000

Over 100,000

Hrs 10

Hrs over 100

Survey Question 15

Do you feel that your water right is threatened by interests in Montana?

Majority feels their water right is threatened by interests in Montana and in downstream states.

Survey Question 16

Other comments or concerns about the adjudication process or how water rights are currently administered?

Local process is not contentious now. Will it be after the adjudication?

Development pressure is not legally available water.

Adjudication process is a tax on water for which I have a legal right, and this confirms that the DNRC is not doing its job. Why would adjudication be necessary had DNRC already kept its files current and accurate?

Concerned about losing my local control.

Water rights now are administered appropriately. A new adjudication will complete upheaval of system. Too complicated and too large of an area to administer.

Get it done once and for all.

From my personal experience] water rights ran through the courts twice. [I] see no need to go through courts again.

New decrees will be a huge unknown to most of us. There will be more and more pressure on current water users due to changes in population and land use."

Hiring more people and spending more money on this process in all likelihood will create a bigger mess than we are already in. If recent history is any indication of what we right holders are facing, God help us.

Original decree dates should be considered. [For example,] Flint Creek was decreed in 1906. Lower Flint Creek in 1909. Lower valley users with prior rights could have appeared in court in 1906 but chose not to. Therefore, their priority dates should not prevail over later dates decreed in 1906.

The water rights are better administered by the District Courts than by any bureaucratic arm of the government such as the DNRC.

It's working now why change it? It appears the 'new process' is going to be an attorney's 'heyday' and give several more jobs. Someone will have to pay for them.

I question what has been done with our adjudication tax. We were told that action would take place in fall 2005. To date nothing has happened. Is our money being misused?

My concern is that if the irrigation is changed any with a new decree the entire system will fail, as it has worked fairly well for 100 years plus.

DNRC doesn't seem to do much as it is. So it is hard to assess the benefit of an expanded role.

[The] system appears to be manipulated by certain moneyed special interest groups [which is] a conflict of interest [between] government and special interest groups.

It's a joke.

DNRC will not enforce without an attorney raising hell. [It] should not be this way.

Upper Clark Fork River Basin Survey Summary
Prepared by Jeana Baker
University of Montana Environmental Studies

While the Montana water adjudication process has been going on for 25 years, the Upper Clark Fork River Basin Steering Committee, concerned about its slow pace, is interested in gathering responses from surface water users in two sub-basins. The Upper Clark Fork River Basin Steering Committee conducted this surface water rights survey in two sub-basins of the upper Clark Fork. One is Flint Creek of Granite County which is an example of a basin with existing water right decrees. The other, without water decrees, is Blackfoot in Powell County.

Although the steering committee is aware of the problems that could arise post-adjudication such as the obligation of water commissioners to enforce single, unified water rights in a large basin, the committee believes that the completion of the water adjudication will add certainty and accuracy to administering and enforcing user water rights in Montana.

Listed below are the questions to the survey followed by a brief summary of the responses.

Results

Adjudication Questions from Survey

1. Do you hold a pre-1973 water right from the State of Montana?

The majority of respondents answered "yes." Two said "no".

2. What water uses are provided by your water rights?

Stockwater____ Irrigation____ Domestic____ Mining____ Other____.

The chief water uses in the basin include (in order of most use) irrigation, stockwater, and domestic. There were zero responses to mining and other.

3. Have you or your representative participated in the statewide adjudication of water rights?

Sixteen responded "yes."

4. If the previous answer was yes, how have you participated? Filed a claim____ Hired an attorney
Filed an objection to a claim____ Testified in a hearing____ Other____.

The majority either filed a claim or filed an objection to a claim. Others hired an attorney, and a couple testified in a hearing.

5. What is the estimated cost of your participation in the adjudication process in time and dollars?

A few people said \$500 while other expenses were listed at \$60, \$100, \$600, \$800, \$1500, \$2000, \$3800, 5,000, \$100,000. Only a few responded to the time involved. Some of the hours listed were 25hrs, 40hrs, 80hrs.

6. Is your pre-1973 water right included in a water right decree issued by the Montana Water Court in the current state-wide adjudication process?

The majority responded “yes” that their pre-1973 water right was issued in a water right decree by the Montana Water Court.

7. On a scale of 1 to 10 with 1 meaning very dissatisfied and 10 meaning extremely satisfied, how would you rate the adjudication process?

Left blank: (8)/31=26%

1: (5)/31=16%

2: (5)/31=16%

3: (1)/31=3%

4: (3)/31=10%

5: (7)/31=23%

7: (2)/31=6%

Some said the adjudication process was non applicable.

There were zero responses from 8-10, suggesting that users are not extremely satisfied with the adjudication process.

8. Do you expect that completion of the adjudication will make your use of water?

The majority replied that the completion of the adjudication will make it harder.

9. How will completion of the adjudication affect your use of water?

One respondent said it would be easier because adjudication would “protect current water rights and document actual use prior to 1973.” Most said water adjudication would be harder for the following reasons:

*“Combining several decrees into one is not practical and not historical in use.”

*“More complicated, more expensive but more secure.”

*“More paperwork, wasted time, no help.”

*“Installation of measuring devices.”

*“Lose the use of some water.”

*“More bureaucratic, less collaboration with local users.”

Water Right Administration Questions

10. Is your water right regularly administered by a water commissioner?

The majority responded “no.”

11. The cost of a water commissioner is now borne proportionately by those water rights holders who receive water pursuant to the commissioner’s actions. Would you support requiring all water rights holders in the decree that the commissioner is enforcing to help pay for the commissioner?

Thirteen answered “yes.” Six said “no.” Seven said “don’t know.”

12. Do you expect that enforcing your water right(s) will be easier or harder after the adjudication process is completed?

Fifteen answered that it would be harder after the adjudication process. Nine said it would be easier.

13. Should the DNRC be more active in enforcing water rights?

Eleven reported that the DNRC should be more active in enforcing water rights. Eight said “no.” Eight said “don’t know.”

14. About how much time and money have you spent defending your water rights?

For the majority, there was zero cost in defending water rights.

Some mentioned the following costs and hours:

\$0 (10)

\$500 (2)

~\$1000(5)

\$2,000

\$12,000(2)

\$25,000

\$28,000

Over 100,000

Hrs 10

Hrs over 100

15. Do you feel that your water right is threatened by interests in Montana?

The majority feels their water right is threatened by interests in Montana and in downstream states.

16. Do you have any other comments or concerns about the adjudication process or how water rights are currently administered?

*“Local process is not contentious now. Will it be after the adjudication?”

*“development pressure is not legally available water.”

*“adjudication process is a tax on water for which I have a legal right, and this confirms that the DNRC is not doing its job. Why would adjudication be necessary had DNRC already kept its files current and accurate?”

*“concerned about losing my local control.”

*“water rights now is administered appropriately. A new adjudication will complete upheaval of system. Too complicated and too large of an area to administer.”

*“get it done once and for all.”

*“[from my personal experience] water rights ran through the courts twice. [I] see no need to go through courts again.”

*“new decrees will be a huge unknown to most of us. There will be more and more pressure on current water

users due to changes in population and land use.”

*“hiring more people and spending more money on this process in all likelihood will create a bigger mess than we are already in. If recent history is any indication of what we right holders are facing, God help us.”

*“original decree dates should be considered. [For example,] Flint Creek was decreed in 1906. Lower Flint Creek in 1909. Lower valley users with prior rights could have appeared in court in 1906 but chose not to. Therefore, their priority dates should not prevail over later dates decreed in 1906.”

*“the water rights are better administered by the District Courts than by any bureaucratic arm of the government such as the DNRC.”

*“it’s working now why change it? It appears the ‘new process’ is going to be an attorney’s ‘heyday’ and give several more jobs. Someone will have to pay for them.”

*“I question what has been done with our adjudication tax. We were told that action would take place in fall 2005. To date nothing has happened. Is our money being misused?”

*“my concern is that if the irrigation is changed any with a new decree the entire system will fail, as it has worked fairly well for 100 years plus.”

*“DNRC doesn’t seem to do much as it is. So it is hard to assess the benefit of an expanded role.”

*“[the] system appears to be manipulated by certain moneyed special interest groups [which is] a conflict of interest [between] government and special interest groups.”

*“it’s a joke.”

*“DNRC will not enforce without an attorney raising hell. [It] should not be this way.”

*“Water rights are currently administered on a local level with separate and historical decrees. The committee should do everything it can to see that this stays the same. The Brute Force approach with a drainage wide single decree will not work in the best interest of the little guys.”

Steering Committee and Adjudication Information

Members of the Steering Committee are appointed by the basin's six county commissions and six conservation districts and the Director of the Department of Natural Resources and Conservation. Members include representatives of basin farmers and ranchers, environmental/recreation organizations, industries, hydropower utilities, and state agencies. A list of current Steering Committee members is on the back of this sheet.

In December 1994, the Steering Committee adopted and presented to Montana's governor and legislature the *Upper Clark Fork River Basin Water Management Plan*. The purpose of the Steering Committee is to implement this plan and amend it as necessary consistent with its statutory authority (see 85-2-338 MCA). The Steering Committee intends all of its actions to take into full account the law of prior appropriation.

In 1979, the Montana Legislature passed a statute requiring the adjudication of all pre-1973 water rights. Prior to this date, the State had no written record of most water rights. The adjudication began in 1982 with individuals filing their water rights claims. By 2005, no final water right decrees have been issued by the Montana Water Court which was established to conduct the adjudication. The 2005 Legislature required water rights holders to pay a fee, which for most holders is \$10 per year per water right, to fund completion of the adjudication process by 2020.

Because of its commitment to the first-in-time, first-in-right water rights system, the Steering Committee has a long-standing interest in the adjudication process. The Steering Committee believes that the most critical problem with the adjudication is the slow pace at which it is producing accurate and enforceable decrees. While the Steering Committee did support the 2005 Legislature's action to provide more resources to hasten completion of the adjudication, it took no position on the means of raising the additional funding. The most critical post-adjudication problem is the reliance on the employment of water commissioners to enforce a single, unified water rights decree in a large basin.

Steering Committee Membership List

Name	Telephone Number	Area or Organization Represented	Appointed Entity
Bob Benson	549-1426	Clark Fork-Pend Oreille Coalition	DNRC Director
Stan Bradshaw	449-9922	Trout Unlimited	DNRC Director
Robin Bullock	782-9964 X1814	ARCO	DNRC Director
Bob Bushnell	362-4629	Lincoln Area Rancher	Lewis and Clark Conservation District
Jim Dinsmore	288-3393	Hall Rancher	Granite Conservation District
Holly Franz	442-0005	PPL Montana	DNRC Director
Carol Fox	444-0209	Natural Resource Damage Program	DNRC Director
Steve Fry	509-495-4084	Avista Corporation	DNRC Director
Eugene Manley	288-3409	Granite County & Montana Water Resources Association	Granite County Commission
Brent Mannix	793-5857	Big Blackfoot Rancher	North Powell Conservation District
Jim C. Quigley	492-6542	Little Blackfoot Rancher	DNRC Director
Pat Saffel	542-5500	DFWP	DNRC Director
John Sesso	723-8262	Butte/Silver Bow Planner and Member Montana House of Representatives	Butte/Silver Bow Commission
Dan Ueland	728-9916	Silverbow Rancher	Mile High Conservation District
Jules Waber	846-3680 X32	Powell County Superintendent of Schools	Powell County Commission

Appendix 3

March 13, 2006

Memo

TO: Upper Clark Fork Steering Committee

FROM: Jon C. Sesso, BSB Planning Director

RE: Adjudication Fee Exemption for Domestic Wells/Potable Uses
Groundwater Use/Permits for Subdivisions

At our February meeting, I had to leave during the discussion about the groundwater uses, augmentation plans and other issues related to the position paper that has been drafted under the direction of the Committee. I want to take a moment to share a couple ideas for consideration.

1) **Adjudication Fee Exemption for Domestic Wells/Potable Uses**

In what I consider to be an inadvertent consequence of HB 22, folks who have a small (low gpm rate) domestic well used for strictly potable purposes on a residential property (< 3 acres) have to pay the \$10 per year as part of the effort to complete the water rights adjudication process. In my view, these folks have very little interest in that process, i.e., their “water right” is quite limited and different from rural or ag users; consequently, I was suggesting (at the meeting) that perhaps these small users of groundwater should be exempt from paying the fee.

However, I also would not want to increase the burden on all the other water rights holders with a great interest in resolving the adjudication uncertainties. So, after getting some data on how many holders would be affected and thus how much money they are collectively contributing to the effort, I was suggesting that we find an alternative source of funds (e.g., general fund) to cover these smaller groundwater users.

To some, the \$10 may be incidental and that ALL users have an equal interest and obligation to contribute. From that perspective, it would not be worthwhile to go through what would be a pretty involved process to adopt an exemption. That valid perspective may prevail, but I thought the idea was worth some discussion.

2) **Groundwater Use/Permits for Subdivisions**

Another concept for discussion was compelling developers to “pay” for groundwater use in residential subdivision. I haven’t thought this through much, and it seemed Committee members felt it may be an old idea that has not got much traction in the past. If so, I defer. However, it would seem reasonable to assign a value to the groundwater in a residential subdivision and treat domestic users the same as irrigations. The total water used in a subdivision, either in a community well system or an array of individual wells, has an impact on both groundwater and surface water supplies, and this impact should be accounted for in the development plan, not to mention in augmentation plans, in water rights, etc.

For example, say a developer buys 300 acres of suburban land formerly used for farm and ranch operations, and creates 60 lots served by individual wells. The sum total of groundwater use may be as much as 6,000 gallons per day, every day, forever. Each lot owner believes the sole costs are drilling and maintaining the well, and I would bet, that owner thinks the water is “free”. The question: Shouldn’t the developer and then the lot owners have to pay for the use of that water? By comparison, the property owner in the urban area served by a public system has to pay significant rates for water.

From a large perspective, both the suburban well user, the urban ratepayer, and irrigator are accessing the same natural resource, and there appears to be some inequity.

Appendix 4
RESPONSE TO FEBRUARY 2006 WHITE PAPER
REGARDING WATER MANAGEMENT FOLLOWING ADJUDICATION

3-31-06

From: Dave Pruitt, former Chief Water Commissioner for Gallatin County's 18th Judicial District; George Alberda, West Gallatin Water Commissioner; Peter Marchi, Musselshell Water Commissioner; Walt Sales, Chair of AGAI; Dorothy Bradley, District Court liaison to the Gallatin Water Commissioners.

During a telephone conference call on March 20, 2006, Gerald Mueller and Mike McLane invited our group to submit our concerns regarding their White Paper for the record and for further discussion. We appreciate this. They are as follows:

- 1) Our water enforcement systems for the Musselshell, West Gallatin, Willow Creek, and Middle Cottonwood are working well.
- 2) We believe that any centralization of the water commissioner function, particularly turning commissioners into state employees, would neither improve water regulation nor be acceptable to water rights owners.
- 3) We have not thought of any hypothetical situation which would be better resolved by a different enforcement scheme than the one we have.
- 4) The relationship of commissioners with district judges has not only worked adequately and efficiently, but, coupled with a system of water mediation, has kept litigation to a minimum.

Decree Integration

The authors anticipate "decree integration" as the most significant change that will come with the completion of adjudication. They presume that decree enforcement will be integrated into the five major basins of Montana. While we agree that changes will come with completion, the expected date is 15-20 years in the future. And the outcome may not be integrating enforcement into five large basins.

Consider a hypothetical in which a call is made by a senior water rights owner down the Yellowstone River east of Billings for junior water in the Shields Valley. The junior user would likely invoke the Doctrine of Futility, and argue that his forbearance of use would never benefit the senior user. If the burden of proof of futility is on the junior user, he might be forced to sacrifice his operation for an entire season, baking his fields in the sun, to prove the point. Rigid enforcement of seniority from the top to bottom of such an immense drainage would not seem practical.

The Water Court is expected to adjudicate 85 decrees for the 85 Montana hydrologic basins, and this number may increase for convenience into more sub-basins. In the meantime, enforcement might well continue in many separate sources or drainages, without encompassing an entire basin decree. Accordingly, the system of judicial appointments would continue to be appropriate.

The example raised by Mike and Gerald -- a call for senior water by downstream hydropower interests -- is a dreaded possibility and could shake the whole system to the core. While the present system of judicially appointed commissioners is not prepared to deal with this eventuality, neither is the entire state, nor would a centralized system of regulation appear to offer easy answers.

The Judicial Connection

Temporary preliminary decrees of the Montana Water Court are now being enforced for several of Gallatin County's major drainages. Little has changed after 100 years of enforcing prior decrees, except

legally secure and readily available numbers, records, quantities, use types, dates of use, names and addresses. Local flexibility and judicial involvement are key ingredients to success. On the occasion of commissioner turnover, the district court judge selects a new commissioner following applications, interviews, and consultation with the users who will be paying the bill. Considering the task of watching 35 West Gallatin ditches between the mouth of Gallatin Canyon and the Interstate, the commissioner must intimately know the lay of the land. To their immense credit, the irrigators have voluntarily gone beyond the letter of the law with their water use, becoming the central watchdog that assures a sufficient flow in even their greatest time of need. Rarely do users need more than a phone call from their commissioner to shut their headgates when the water drops. Bills are calculated by the commissioners, mailed by the Clerk of District Court in October, and mostly paid by the users to the commissioners by December. The commissioners sometimes include requests to improve headgates or upgrade measuring devices, and the requests are generally met. There is no shortage of applicants for the job. Bi-annual meetings with the district court judge, water judge, and users assure open communications and respected expectations. Even with the completion of adjudication, we do not see what improvements would be gained by scrapping this system.

Disputes

Water rights disputes do arise, and will always arise. The question is how to resolve them inexpensively and quickly, considering that haste is often of the essence. Our experience is that local control is a viable approach if not the best approach. Water mediation is enabled by §85-5-110, MCA. The 18th Judicial District has encouraged it by assuring that mediation training is provided to water commissioners, who, with their wealth of knowledge from the trenches, frequently serve as excellent mediators. Resolving a water dispute quickly may be more of an art than a science, involving a little give here and there that will avoid protracted litigation. In any case, whether enforcement is local or centralized, a bank of well trained mediators as an important component for present and future enforcement and dispute resolution.

Issues in need of Answers

We believe the present system of court-appointed commissioners has problems in need of resolution. For example, Workers Compensation was superimposed on top of water commissioners to solve one of the unintended consequences of state assumption of district courts. While some kind of accident insurance is advised, Workers Compensation is not well suited for commissioners. A commissioner may be petitioned for work that will involve a handful of users and only a few hours of work scattered over a few months. Adding a \$600 workers comp bill to an otherwise small fee will discourage users from utilizing a system that protects their seniority and resolves their conflicts. However, replacing local commissioners with a system of state employees would be like doctoring a few small cuts with a hip replacement – the new hip is not needed, and the cuts may continue to be unaddressed.

Appendix 5
EPA Proposed Wetlands Conservation Rule